Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

PETITION FOR RECONSIDERATION

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SUMMARY

The Commission should reconsider three aspects of the cable rate regulations. Absent reconsideration, cable operators will have little incentive to expand and modernize their systems, will be prevented from making legitimate responses to competition and will have to comply with unreasonable leased access requirements.

First, the rate regulations do not make appropriate provisions for expansion and improvement of cable systems. Congress intended for growth and expansion of cable systems to continue, but cable operators are required to make onerous cost-of-service showings to recover costs of system improvements. The Commission should adopt rules to permit cable operators to recover the costs of expansion plus a reasonable return via a pass-through, with oversight by franchising authorities.

Second, the uniform rate structure requirements of the 1992 Cable Act should not be applied to individually-negotiated arrangements with multiple dwelling unit owners. Congress did not intend to prevent cable operators from meeting competition in these negotiations. Moreover, the current uniform rate rules handicap cable operators even though there is no evidence of abuse. The Commission should revise the rules to permit individual negotiations and should grandfather existing contracts.

The current leased access rules also should be modified. The formula for maximum rates does not account for the value of services to subscribers, and thus will not prevent programmer migration. The rules also must account for the costs of part-time leasing. Finally, the widespread availability of competitive providers of billing and collection renders requiring cable operators to provide this service unnecessary.

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Comcast Cable Communications, Inc. ("Comcast"), by its attorneys, hereby submits its petition for reconsideration of the Commission's order in the above-referenced proceeding.[1] The Order attempts to implement the rate regulation provisions of the 1992 Cable Act,[2] but in doing so it creates disincentives for expansion and modernization of cable systems, prevents cable operators from making legitimate responses to competition and imposes unreasonable leased access requirements. The Commission should reconsider the Order as described herein.

I. INTRODUCTION

Comcast is the fourth-largest cable television provider in the United States. It provides service to more than 2.8 million subscribers across the country. Comcast has evaluated the Order to determine how the new rules will affect its ability to provide quality service to its subscribers at fair prices and has concluded that the

1/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 — Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Dkt. No. 92-266, FCC 93-177 (released May 3, 1993) (the "Order").

2/ Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act") (codified at 47 U.S.C. §§ 521 et seq.).

Commission must reconsider three aspects of the Order. While these are not the only flaws in the regulations, they are the ones of most concern to Comcast.[3]

First, the benchmark/price cap scheme adopted by the Commission will not permit cable operators to invest in expanding the services they provide to customers, even though the 1992 Cable Act encourages and mandates such investment. Second, the Order's implementation of the uniform rate structure requirements will prevent cable operators from competing fairly with SMATV operators and other competitors. Third, the leased access rules place an unfair competitive burden on cable operators. Comcast respectfully submits that these aspects of the Order should be reconsidered.

II. THE RATE REGULATION MECHANISMS ADOPTED IN THE ORDER WILL NOT PERMIT CABLE OPERATORS TO INVEST IN IMPROVEMENT OF THEIR CABLE SYSTEMS.

It is ironic that the Order does not act to preserve one aspect of the maturation of the cable industry that has not been criticized: the growth and expansion of cable systems and their offerings to the American public. Despite the evident value of expanded cable offerings and of advanced technology, and a stated intention to "permit the continued growth of services," the Order does not provide for omission by adopting new provisions to account for the costs of expansion, upgrades and modernization.

A. Congress Intended for Cable Operators to Retain the Ability to Expand and Improve Their Services.

By freeing operators from artificial rate constraints, the 1984 Cable Act granted cable operators the incentive to modernize and expand their cable systems. There is no dispute that this legislative goal was realized. As the Order explains: "The 1984 Act achieved many of its objectives. The number of communities and homes served by cable grew dramatically. System channel capacity increased and continues to do so. New channels of programming were created and investment in programming multiplied."[5/] This expansion in the scope and breadth of cable service was accompanied by increased subscribership and viewership.[6/] Comcast, in particular, has increased subscribership ten-fold over the past ten years. The growth only came, however, because of greatly increased investment. In fact, cable operators' investment in new and expanded plant and channel capacity grew by 55 percent during the first five years after the adoption of the 1984 Act.[7/]

5/ Order at ¶ 7 (footnote omitted). The Commission reached the same conclusions in its 1990 report on the cable industry. Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, 5 FCC Rcd 4962, 4971 (1990) (the "FCC Cable Report").

6/ See National Cable Television Association, Cable Television Developments, at 2-A, 5-A (Oct. 1992) (growth from 37 to 55 million households subscribing and a 75 percent increase in viewership of cable programming over seven year period).

7/ FCC Cable Report, 5 FCC Rcd at 4966.

Congress explicitly recognized that expansion of the cable industry was an important positive result of the 1984 Cable Act. The Senate Report stated that:

> The 1984 Act has achieved many of its objectives. Over the past seven years, the cable industry has grown dramatically. Most of American is now wired to receive cable; cable service is available to almost 90% of the homes in the country, and over 60 percent of these households subscribe to cable service. System capacity has increased; the average cable system offers about 36 channels, and this number is steadily increasing. Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned.[8/]

The House Report, commenting on the same growth in subscribership and in diversity and quality of programming, added that "[w]hen the Cable Act was passed in 1984, Congress believed that deregulation would enable the cable industry to prosper, benefiting both consumers and industry participants alike. To a large extent, that prediction has been realized."[9/] Congressional approval of the growth and improvement of cable service could not be more obvious, and Congress did not intend to prevent the continuing enhancement of cable service for all consumers.

Many elements of the 1992 Cable Act demonstrate that Congress intended to continue the improvement of cable service into the future. First, expansion of capacity and programming is one of the stated purposes of the 1992 Cable Act.[10/] Second, Congress imposed obligations on cable operators that can best be realized only with increased system capacity and advanced technology. These obligations include setting aside significant capacity for carriage of broadcast

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8/ S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991) (the "Senate Report").

9/ H.R. Rep. No. 628, 102d Cong., 2d Sess. 29 (1992) (the "House Report").

10/ 1992 Cable Act § 2(b)(3).

channels;[11] stringent technical standards;[12] increased access to pay-per-view and per-channel programming;[13] and equipment compatibility.[14] Third, the Commission's obligation to account for the costs of capital when reviewing cable programming service rates shows that Congress expected capital expenditures to continue.[15]

The Commission must both account for Congressional intent and put all statutory requirements into effect when it designs rules.[16] Thus, the Commission's rate regulations must recognize both Congress' approval of the cable industry's because recouping their costs, let alone achieving an appropriate return on such extensive capital investment, will be difficult at best.

First, the Order fails to address the subject of expansion, upgrades and modernization of cable systems. The only discussion of the effect of increases in channel capacity occurs in the draft rate regulation worksheets, which are used only at the time of initial regulation.[17/] At the same time, there is no provision whatsoever in the benchmarks or price caps to account for system improvements. The benchmarks do not even compensate operators for the programming costs of additional channels, much less the costs of constructing them.[18/]

In other words, the benchmark regulations, as adopted, are based on a snapshot frozen in time on September 30, 1992. This static picture does not reflect the reality of cable systems, which must respond constantly to new technologies, competitive services, new programming and evolving consumer demand.[19/] Cable operators will be faced with the choice of not responding to the demands of the marketplace (and the demands of the 1992 Cable Act) or of meeting the need by upgrading and bearing the costs without any likely return. Neither of these choices is

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17/ Order, Appendix D at 8 (instructions for worksheets). Commission staff has indicated informally that the Commission intends to adopt rules for changes in system configuration, but those rules have yet to be proposed.

18/ For instance, adding five satellite channels to a 10,000 subscriber system with 45 total channels and 30 satellite channels increases revenues less than $0.125 per channel per subscriber. This is less than the costs of many services. Even a 1,500 subscriber system adding two satellite channels to a 20 channel, 13 satellite service system can charge only $0.49 more per subscriber, and the more channels a system has, the less the incentive to upgrade: adding five satellite channels to a 90 channel system produces added revenues of about seven cents a channel. When the capital costs to expand are added to the programming costs for new services, the economic incentives for expansion are non-existent.

19/ For instance, many systems will have to expand their capacity dramatically to accommodate HDTV in light of the Commission's simulcasting requirement.

consonant with the goals of the 1992 Cable Act or with principles of fair regulation.[20]

In theory, cable operators can solve this dilemma by turning to cost-of-service showings, but the uncertainties of the cost-of-service process make it an prosecuting a cost-of-service showing will add to the costs of any expansion and, if experience is any guide, these costs will be substantial. Moreover, delays of a year or more at the Commission are likely if any significant number of cost-of-service proceedings are filed in a given year.[24/] This does not account for the delays and costs arising from having to make a cost-of-service showing to the franchising authority as well. These delays will add both to the uncertainty of cost recovery and the time that the cable operator must bear the costs of an upgrade without any corresponding revenue.[25/] Neither stockholders nor commercial lenders can be expected to provide funds for plant upgrades without some prospect that the costs and an accompanying reasonable return can be recouped in some reasonable time frame.

This is a particularly troubling notion for a company like Comcast whose service clusters include large populations in Florida, Connecticut, New Jersey, metropolitan Detroit, Philadelphia, Indianapolis, Baltimore and Los Angeles. Comcast has developed an aggressive plan for rolling out addressability throughout its systems over the next five years. Indeed, our goal has been to provide addressability to 60 percent of our subscribers in that time, and we had envisioned that 41 percent of our cable capital expenditures would be devoted to rebuilds this year alone. Under the current rules, which significantly decrease system cash flow and render credit

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24/ If each of the country's 11,385 cable systems filed a cost-of-service showing to recover modernization costs only once every fifteen years, this would result in an average of 759 filings per year.

25/ In fact, increases in cable programming service prices cannot be approved before they go into effect, let alone before new facilities are constructed or contracts for new programming signed, because the Commission can consider whether a cable programming service rate is unreasonable only after a complaint is filed, eliminating the possibility of pre-approval. 47 U.S.C. § 543(c). This greatly increases the risks of cable programming service cost-of-service showings for upgrades and rebuilds.

availability from lenders tenuous, plans like these must be re-evaluated and may well be unrealistic.

C. The Commission Should Adopt Rules that Permit Recovery of the Costs of Expansion and Improvement of Cable Systems Without Resort to Cost-of-Service Showings.

There is a solution to the dilemma caused by a combination of the need for continued expansion and improvement of cable systems and the Order's failure to consider those needs: The Commission should adopt rules that give cable operators a their systems.[27/] For those systems that do decide to run the risk, the costs to regulators will be enormous.[28/] A pass-through, however, will greatly reduce the number of cost-of-service showings and greatly reduce the evidence that will have to be examined in evaluating rates that result from system expansion or improvement.

Franchising authorities should evaluate cable operators' proposed charges for capital improvements. This role is consistent with both their part in regulating basic service rates and the 1984 Cable Act's delegation of authority over franchise-required facilities to franchising authorities.[29/] In addition, considering only the charges relating to the capital improvements will greatly reduce the burdens of the process on both regulators and cable operators, especially when compared to the burdens that would result from full-blown cost-of-service proceedings. In fact, the availability of rate increases for capital improvements will encourage cable operators to keep rates within the established price caps because there will be less need for cost-of-service showings.

The Commission should adopt rules that require cable operators to notify franchising authorities at least 60 days before any pass-throughs for system would then consider whether the costs were sufficient to justify the additional charges.[30] If, before the end of the 60 days, the franchising authority disapproves of the additional charges, there should be a 30 day period for negotiation between the franchising authority and the cable operator. If negotiations fail, the parties should be required to enter into arbitration regarding the amount of the additional charges.[31] During the negotiation period and any additional proceedings, cable operators should be allowed to impose the additional charges, subject to later rate adjustments if necessary.

Cable operators proposing pass-through charges for system expansion and upgrades should be allowed to include all costs associated with improvements in cable systems. These costs include such items as construction costs, equipment costs and the costs of personnel necessary to operate and maintain new equipment or other facilities.

"Pure" costs are only part of an appropriate pass-through, however. Investments in improved service will continue only if cable operators can anticipate a reasonable return on those investments. As the Order acknowledges in discussing equipment costs, the cost of capital is part of any cost determination.[32] A pass-through that omits capital costs will make cable operators look elsewhere for

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30/ The franchising authority would consider only whether the cable operator provided sufficient cost justification for the additional charges, not whether the expansion itself is justified. As described above, this is a matter best left to the cable operator's business judgment.

31/ Use of a commercial arbitrator may be uniquely appropriate because all that is at issue is the reasonableness of the additional costs to rebuild. The arbitration process will resolve disputes without burdening the Commission.

32/ Order at ¶ 295. The Order also acknowledges that cable operators are entitled to a fair return on their overall cable investments. Id. at ¶¶ 264, 271 n.637.

investments that promise a return, preventing consumers from realizing the benefits of upgrades and other enhancements to their cable service. Thus, any pass-through should include a provision for a reasonable return, based on the costs of capital for the cable industry. An appropriate return currently would be fifteen percent.

The pass-through charge for capital improvements should be calculated based on ten year depreciation and the return on the undepreciated portion of the total cost. If a rebuild costs $1 million, then the cable operator should be permitted to recover $100,000 in depreciation and $135,000 in return on the undepreciated portion (fifteen percent of $900,000) of the total cost in the first year, and another $100,000 in depreciation plus $120,000 in return on the undepreciated remainder ($800,000) in the second year. For a 30,000 subscriber system, this would result in additional charges starting at $0.65 per month for each subscriber in the first year and $0.61 in the second year, and ranging down to $0.32 in the tenth year after the expenditure. If subscribership increased, the charge would be reduced in proportion to the increase in subscribers.

III. THE UNIFORM RATE STRUCTURE REQUIREMENTS UNREASONABLY PREVENT CABLE OPERATORS FROM MAKING REASONABLE RESPONSES TO COMPETITION.

Competition already has succeeded in the provision of service to multiple dwelling units ("MDUs"). Cable operators compete vigorously and fairly with SMATV and MMDS operators for the right to serve individual MDUs on the basis of individually negotiated contracts. The Order unreasonably restricts this competition by requiring cable operators to offer uniform rates to all MDUs in a franchise area. This rule is contrary to Congressional intent and will harm both cable operators and residents of MDUs.

A. The 1992 Cable Act Permits Operators to Negotiate Cable Service Contracts with Multiple Dwelling Unit Owners.

First, an accurate reading of the 1992 Cable Act shows that the uniform pricing provision need not restrict a cable operator's ability to fairly negotiate rates with owners of MDUs. The purpose of the uniform pricing provision is to prevent cable operators from engaging in predatory pricing that would thwart competition and thereby deny consumers access to potential alternative service providers. The restrictions imposed by the rules go beyond this statutory mandate. Thus, the Commission should reconsider its insistence upon uniformity.

The 1992 Cable Act requires that an operator's rate structure, not its rates, be uniform.[33/] The Commission correctly interpreted this provision to permit non-predatory bulk discounts for MDUs.[34/] Owners of MDUs, like owners of other commercial entities, have access to service options that are not generally available to individual residential cable subscribers. As the Commission has noted, SMATV services are available virtually nationwide.[35/] Armed with their access to SMATV or MMDS, coupled with their in-bulk buying power, MDUs are positioned to negotiate with cable operators over the specific terms of bulk discount

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33/ 47 U.S.C. § 543(d).

34/ Order at ¶ 423. Section 623(d) was not meant to proscribe service agreements between operators and bulk purchasers of cable services. However, even assuming, arguendo, its applicability to commercial arrangements, it cannot be assumed that unique but non-predatory arrangements are to be prohibited.

35/ Order at ¶ 31.

arrangements.[36] However, the Commission would now unnecessarily restrict rate differentiation among MDUs in the franchise area.

The rules not only prevent cable operators from successfully negotiating new service accounts with potential MDU accounts, but also from even meeting the rates offered by competitors during usually routine renewal negotiations, because a cable operator may not change its rates except with thirty days prior notice pursuant to Section 76.309.[37] By requiring operators to set up uniform rate cards for MDU and commercial customers, which cannot be altered on less than a month's notice, the Commission is eliminating the operator's ability to respond to a competing video provider's bid. There is nothing in the statute which authorizes the Commission to render cable's services so uncompetitive as to virtually guarantee loss of market share, and it is hard to imagine this was Congress's intention.

In justifying the uniform rate provision, the legislative history of the 1992 Cable Act always qualifies the language of the provision by stating that it is "intended to prevent cable operators from . . . undercut[ting] a competitor temporarily."[38] The Commission should tailor its regulations to conform to this mandate by prohibiting anti-competitive practices, yet permitting an operator to

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36/ While individual subscribers may be reluctant to invest in those home satellite receivers currently available, installing a dish or contracting with a SMATV operator is a real option for owners and managers of MDUs, especially since these alternative video providers do not pay franchise fees and are willing and able to compensate the owner directly for access to the unit.

37/ Even the Robinson-Patman Act exempts from its price discrimination provisions price differences to "meet an equally low price of a competitor." 15 U.S.C. § 14(b). The Commission's rule would subject cable operators to more rigorous limits than those legally imposed on distributors of goods.

38/ Senate Report at 76. See also 138 Cong. Rec. S.14,248 (daily ed. Sept. 21, 1992) (Statement of Sen. Gorton).

compete with alternate video service providers for MDU accounts just as alternate providers compete against each other. Neither the 1992 Cable Act nor its legislative history suggests that competition should be stifled by removing a cable operator from the marketplace, but this will occur if cable operators cannot negotiate the terms of individual bulk accounts. Such arms-length arrangements are not temporary efforts to undercut competitors, nor are they otherwise predatory in nature.

Moreover, there is no basis for the regulations. The Commission appears to assume that cable operators will reduce prices below bona fide negotiated levels. The Commission may not regulate rates under the assumption that operators will act in bad faith, particularly where the statute and its legislative history contain limiting language that could be implemented by less-restrictive regulation. The Commission cannot, after all, exercise more power than the statute gives it.[39/] Without evidence that cable operators have responded to competition from alternate video service providers with predatory pricing, the Commission should not regulate. This is especially the case when federal antitrust laws already prescribe a remedy.[40/]

Many cable operators have been serving the same MDUs for a decade or more. Even with discounted rates, revenues from these MDUs have provided a predictable, steady stream of income. Requiring rate uniformity for MDUs would severely threaten this steady flow of income by harming the operators' chances of

39/ AT&T v. F.C.C., 978 F.2d 727 (D.C. Cir. 1992). See also MCI v. F.C.C., 765 F.2d 1186 (D.C. Cir. 1985).

40/ FTC v. Ticor Insurance, 112 S.Ct. 2169 (1992). Furthermore, to the extent that the Commission's regulations restrain the pricing of services in general, leased equipment and leased access services, those regulations make it that much harder for the operator to price predatorily because it has no way to make up the losses.

renewing their service contracts in the face of pressures for reduced rates or of lower bids by alternate service providers.[41]

Consistent with Congressional intent, the Commission should adopt a rule that prohibits predatory pricing but permits operators to negotiate in good faith with owners of MDUs, and to meet demand or competition. This can be accomplished by retaining the requirement that the cable operator "demonstrate that he/she derives some economic benefit from providing the bulk rate discount,"[42] but removing the requirement that rates for all MDUs in a franchise area have a uniform structure.

B. The Primary Purpose of the Rate Regulation Provisions of the 1992 Cable Act Is to Regulate Residential Customer Rates.

The legislative history of the 1992 Cable Act indicates that the focus of the rate regulation provisions was to affect the rates cable operators charge individual residential subscribers, not MDU owners and customers in commercial buildings. Customers in MDUs have rarely, if ever, experienced excessive rates for cable services because MDU owners always can negotiate low-rate contracts with cable operators. Operators almost always face competition or the possibility of competition from SMATV and MMDS operators in negotiating service contracts with MDU

41/ In addition, requiring uniform rates among all MDUs in a franchise area would interfere with existing contracts negotiated in good faith. MDU owners, in negotiating such contracts, no doubt were aware of other available video service providers, but chose the services of a cable operator. These long term contracts, which are important to fulfilling existing financial obligations, would be frustrated by the Commission's uniform pricing scheme. The terms of existing contracts with MDUs therefore must be grandfathered regardless of any regulations which affect the ability of operators to negotiate the terms of future contracts.

42/ Order at ¶ 424.

owners.[43] Because the 1992 Cable Act is intended to regulate the rates of cable systems not subject to competition,[44] the rationale for the rate regulation provisions, and the uniform pricing provision in particular, does not apply to provision of cable service to MDUs.

Operators who face competition for bulk accounts will be placed in an untenable position absent a revision of the Commission regulations — and the public will not be better off; in fact, the public will be ill-served since there will be less competition than currently exists.[45] The Commission will promote competition in the delivery of video services to MDUs only if a cable operator can compete on the same playing field.

IV. THE LEASED ACCESS RULES PLACE AN UNFAIR COMPETITIVE BURDEN ON CABLE OPERATORS.

Comcast supports the general approach of the Commission's treatment of the new leased access provisions of the 1992 Cable Act. The Order correctly recognizes that the statute's underlying policy objective — the promotion of diversity of programming — should be achieved without violation of the mandate to keep cable operators safe from financial harm. Most especially, the record was replete with expert evidence that migration is a substantial danger. The Order's approach therefore sought to design a regulatory framework for developing maximum reasonable rates for leased access that avoided this principal danger.

43/ The Order recognizes the universal availability of SMATV. Order at ¶ 21

[redacted]

system is already carrying commercial access programming, the rates charged can be used in lieu of any formula imposed in this proceeding. Since these rates, by definition, are not "too high" to preclude leased access arrangements, and are being successfully used currently, they are thus "reasonable," albeit not necessarily the "maximum reasonable" rate an operator could lawfully charge. At a minimum, utilizing these rates to establish a presumption of reasonableness will comport with Congress's recognition that no governmentally-imposed regulation can replicate the efficiencies of marketplace outcomes.

But even within the Commission's construct, a substantial problem remains with the implementation of this model because the adopted formulas will not produce the highest implicit fee for access for the residual category of programming, that is non-pay and non-home shopping programming.

The Commission's calculation of the net implicit fee uses this equation:

(The "value to a subscriber" of a single channel on a tier) **minus**
(The amount of payments made from the operator to the programmer)

The first term of this equation, described by the Commission as the "subscriber fee," is derived by dividing the cost of the total tier by the number of channels on the tier. This latter calculation, however, yields only an "average channel value," not the actual "value to the subscriber" of each particular channel on that tier.[48] In the

48/ The appropriate measure of the implicit fee, given the Commission's correct concern for migration, is the additional net revenues earned by the cable operator from carrying the particular channel in issue. See Stanley M. Besen and Leland L. Johnson, "An Economic Analysis of Mandatory Leased Channel Access for Cable Television," December 1982. The Commission's expression of "value to the subscriber" thus also serves to understate the implicit fee which should appropriately reflect the "value to the operator." Comcast here focuses, however, on the means by which the subscriber value is produced.

Commission's example,[49] the subscriber fee is $0.50, but the actual value for any one channel on the tier could be substantially above or below that $0.50 average.[50]

In reality, certain channels on a tier are inherently more profitable and more valuable than others. In order to discern the actual highest implicit fee charged for unaffiliated tier programming, the formula would, in theory, have to account for those factors which make certain channels of a cable system's tier lineup more valuable than others. Because the Commission's approach imputes the same average value to all channels on the same tier, the formula necessarily understates the actual "highest implicit fee charged any nonaffiliated programmer" on that tier. Thus, the Commission's regulations fail to meet the stated objective — to establish formulas that compute maximum reasonable leased access rates "derived from the highest market value of channel capacity for the system."[51]

Comcast, of course, realizes that the computation of a channel's intrinsic "value" vis-à-vis the overall tier price is no easy task and that such computations could be potentially burdensome if rates are to be computed for every cable system in the country. The Commission also must recognize that the understated implicit charges yielded by this average channel value approach will likely engender the very harm to cable operators that the "highest implicit fee" model was designed to avert. Because the maximum leased access rates cable operators could

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49/ Order at ¶ 518 n.1312. The Commission's example is a 20 channel tier with a monthly rate of $10.00. The value of each channel on the tier is computed as: $10.00/20 = $0.50.

50/ Id. Under the Commission's calculus, public broadcast stations will always have the highest values, since the cost of carrying them to the operator will likely be only the incremental cost of transmission. Certainly such a result is counterintuitive.

51/ Id. at ¶ 519.

charge under the formula would be lower than the highest implicit fees actually charged for nonaffiliated tier programming, the likelihood of migration to leased access by non-leased access programmers would be increased. Thus, a cable operator's ability to establish the "price, terms, and conditions . . . sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system"[52] would be diminished.

Accordingly, to avoid programmer migration and the impairment of cable systems' financial, operational, or marketing enterprises, the Commission should amend its rules to allow cable operators to show, as disputes arise, why a leased access charge above the calculated "maximum rate" for the non-pay, non-home shopping category of programming is warranted. Doing so would enable the Commission to avoid complex, empirical deliberations about channel worth, while giving cable operators flexibility to present evidence of additional factors the Commission must consider in individualized circumstances to arrive at the actual "highest implicit fee charged any nonaffiliated programmer within the same category."

B. Part-Time Rates

Even while acknowledging a dire lack of information, the Order attempts to resolve yet another important aspect of implementation — the rates chargeable for part-time lease of an access channel. Thus, the Order proposes a pro rata calculation for less-than-monthly rates. In practice, however, this general approach becomes wholly unworkable.

52/ 47 U.S.C § 532(c)(1).

Plainly, not all hours are equal. So, too, the Commission must recognize that the transaction costs inherent in arranging for 24 separate leases for each hour of the programming day are much higher than those required to contract with a single lessee capable of 24-hour cablecasting. At the same time, the risk to the operator of having a channel vastly underutilized by only a few part-time lessees is also a real opportunity cost that must be taken into consideration. Similarly, daily or weekly lessees impose varying transaction and opportunity costs. The rate for the part-time lessee, to be deemed reasonable either as a matter of law or common sense, must necessarily reflect these costs.

Unless these costs are accounted for in the rates for part-time lessees, the Commission's maximum leased access rate approach may force cable operators to charge unduly high rates for off-peak leased access time, to the detriment of, in particular, those less well-established programmers whose commercial viability the leased access rules are principally intended to promote. Thus, diversity — a primary objective of the leased access provisions — will be diminished. Given the Commission's lack of information on this issue, it should not impose any requirements until a specific controversy arises.

C. Billing and Collection

The Commission's treatment of billing and collection begins from the premise that billing and collection services should be required of cable operators absent a record that these services are competitively available elsewhere.[53/] But there is nothing in the statute suggesting that the presumption should be in favor of an

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53/ Order at ¶ 504.